



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

August 27, 2009

Business Alaska, Inc.  
c/o John Floyd, President  
2351 Heatherbrook Circle  
Anchorage, AK 99504

RE: MUR 5534

Dear Mr. Floyd:

In a letter dated August 14, 2009, you were notified that we would be sending you a Factual and Legal Analysis further explaining the basis of the Federal Election Commission's decision to take no further action as to Business Alaska, Inc., and close the file in this matter in an exercise of prosecutorial discretion.

Enclosed please find the Factual and Legal Analysis approved by the Commission. This document will be placed on the public record as part of the file in MUR 5534.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Dawn M. Odrowski".

Dawn M. Odrowski  
Attorney

Enclosure  
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENT:** Business Alaska, Inc.

**MUR: 5534**

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8 **I. BACKGROUND**

9 This matter arose from a complaint and supplements thereto alleging that Business Alaska,  
10 Inc. ("BA") failed to register and report with the Commission as a political committee, failed to  
11 disclose as an electioneering communication, or otherwise, its financing of a television ad that  
12 referenced Tony Knowles, a candidate in the 2004 U.S. Senate election in Alaska, improperly used  
13 corporate funds to finance the television ad and three newspaper ads that supported Knowles'  
14 opponent Lisa Murkowski, and failed to include appropriate disclaimers on the ads. The  
15 Commission found reason to believe that BA violated the Federal Election Campaign Act of 1971,  
16 as amended ("the Act"), by failing to register and report as a political committee or, in the  
17 alternative, by making prohibited corporate independent expenditures in the form of three  
18 newspaper ads that expressly advocated Murkowski's election and by making, under the law then  
19 prevailing, an impermissible corporate-financed electioneering communication in the form of the  
20 television ad. In addition, the Commission found reason to believe that BA violated the disclaimer  
21 and reporting provisions of the Act in connection with the ads. Accordingly, the Commission  
22 authorized an investigation on alternative theories.

23 Since that time, two Supreme Court decisions either have affected, or may affect, this  
24 matter. As a result of the U.S. Supreme Court's decision in *FEC v. Wisconsin Right to Life*  
25 *Committee, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL*), BA's financing of the television ad is now  
26 permissible in that the Court limited the reach of the prohibition on corporate funding of  
27 electioneering communications to communications that are the "functional equivalent of express

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1 advocacy.” *Id.* at 2670, 2673. In addition, the Supreme Court has recently scheduled *Citizens*  
2 *United v. FEC*, S. Ct., No. 08-205, for reargument and has sought additional briefing on whether it  
3 should overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990),  
4 and part of *McConnell v. FEC*, 540 U.S. 93 (2003), which address, respectively, the prohibition on  
5 corporate independent expenditures and corporate funding of electioneering communications.  
6 Moreover, the initial briefing of *Citizens United* before the Supreme Court addressed whether or  
7 not the reporting and disclaimer requirements may permissibly be applied to advertisements that  
8 are not the functional equivalent of express advocacy. *See Citizens United*, FEC’s Motion to  
9 Dismiss or Affirm at I. To the extent the Supreme Court addresses those issues, BA’s obligation  
10 to include a proper disclaimer on the television ad may be affected. In addition, the Court’s  
11 decision could have a direct impact on BA’s financing of the newspaper ad.

12       Regardless of the eventual outcome of the *Citizens United* case, we have determined that  
13 the use of Commission resources is no longer warranted. The investigation did not establish  
14 political committee status, a primary violation in the complaint. Although additional violations  
15 may remain, BA is essentially defunct with no or minimal assets. In addition, BA has been  
16 inactive for several years and has represented that it intends to terminate as a corporation, so it is  
17 unlikely to engage in future activities. Under these circumstances, the Commission decided to take  
18 no further action and close the file in this matter as an exercise of its prosecutorial discretion. *See*  
19 *Heckler v. Chaney*, 470 U.S. 821 (1985).

**II. FACTUAL & LEGAL ANALYSIS**

**A. FACTUAL BACKGROUND**

**1. BA's Organizational Structure and Purpose**

BA incorporated as a nonprofit organization in the State of Alaska on March 12, 2004 and described itself in its Articles of Incorporation as an organization exempt from federal taxation under section 501(c)(6) of the Internal Revenue Code, which covers business leagues.<sup>1</sup> BA's Articles of Incorporation state that it was organized as "a political advocacy and public education organization."

According to BA's former and current presidents and the former executive director of BA, who simultaneously served in that role for a related organization, Forward Alaska ("FA"),<sup>2</sup> BA was formed to raise awareness about local issues of interest to businesses such as smoking and signage laws and excessive regulation, to have an impact on electing candidates for the Anchorage municipal assembly to address those issues, and to encourage effective government in Alaska and local communities through education and advocacy. BA's bylaws generally confirm these statements, describing its purpose as providing "a formally structured vehicle for public education and advocacy from a conservative perspective" and stating that BA would educate Alaskans on public issues, including "fiscal management of public investments, limited taxation, property rights, public lands use and development, environmental issues, parental rights and responsibilities, and safety."

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<sup>1</sup> BA also submitted an application for recognition of tax exempt status under I.R.C. § 501(c)(6) to the Internal Revenue Service ("IRS") on February 26, 2004. See Attachment to BA's Response to Complaint.

<sup>2</sup> According to its former executive director, BA was an offshoot of Forward Alaska, which was incorporated in Alaska on December 13, 2003 and described itself in its Articles of Incorporation as a 501(c)(4) corporation. Both BA and FA described themselves in their respective corporate and IRS filings as political advocacy and public education organizations.

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Other than the general statement in BA's publicly-available Articles of Incorporation that it was organized as "a political advocacy and public education organization," BA appears to have made no public statements about its purpose. The investigation uncovered no evidence that BA made statements about its purpose in written solicitations or oral presentations to potential donors. According to BA's president, it did not solicit funds from the public or engage in fundraising activities, and it had no website. BA's bank records indicate it received most of its initial funds from a handful of businesses, including corporations and individuals that it regarded as "members." Later, BA received additional funding from members of a trade association whose representative approached BA about running ads about the Pew Oceans Commission ("the Pew Commission"), a private group that issued a report in 2003 concerning national oceans policy.

**2. BA's Public Communications and Other Activities**

An examination of BA's bank records showed that it raised \$89,400 and spent \$87,000 between its incorporation in March 2004 through January 2005. These records and other documents obtained in the investigation show that BA paid for one of three newspaper ads complained of, an ad that expressly advocated the election of Lisa Murkowski to the U.S. Senate and a television ad that referenced Tony Knowles, Murkowski's opponent in 2004.<sup>3</sup> However, a substantial portion of BA's disbursements were for activities unrelated to federal campaign activities.

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<sup>3</sup> BA's bank records indicate that it did not pay for the other two newspaper ads identified in the complaint that contained a BA disclaimer. Rather, David Dittman, who created all three newspaper ads, sought funding from others to pay these advertisements. Ultimately, it appears that Dittman's company, Dittman Research Corporation, paid for one ad and contributed to the financing of the other.

1                                    **a.        The Seniority Newspaper Ad**

2            Documents obtained during the investigation show that an ad called “Our Strength is our  
3    Seniority” (*Seniority*) ran on August 21, 23, and 27, 2004 in the Anchorage Daily News, and on  
4    August 23, 2004 in the Fairbanks Daily News-Miner and Kenai Peninsula Clarion. At the reason  
5    to believe stage, the Commission found that *Seniority*, which included the phrase, “Please support  
6    Alaska and U.S. Senator Lisa Murkowski,” expressly advocated Lisa Murkowski’s election. *See*  
7    Factual and Legal Analysis finding reason to believe (“RTB F&LA”) at pp. 3-4 and 7. Two  
8    versions of *Seniority* were published, one which ran before the primary and one after. Both  
9    versions included the same “Please support . . .” phrase.<sup>4</sup> The disclaimer on both ads stated: “Not  
10   authorized by any candidate. Paid for by Business Alaska, 645 G St. 100-81, Anchorage, AK  
11   99501, (907) 743-0806, Tom McGrath, Treasurer.”

12           The investigation determined that the *Seniority* ad was conceived of, and created by, David  
13   Dittman, president of Dittman Research Corporation (“DRC”), and that he approached BA to fund  
14   the ad. Dittman’s company DRC placed *Seniority* and initially paid the production and placement  
15   costs. Dittman then sent invoices to BA, which ultimately reimbursed DRC \$21,692 for the full  
16   cost of the ad.

17                                    **b.        The Pew Television Ad**

18           The investigation determined that BA reviewed, approved and paid for the television ad  
19   that featured former Governor Tony Knowles, Senator Murkowski’s opponent in the general

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<sup>4</sup> The version published before the primary had a banner on the bottom that stated “Primary election, Tuesday, August 24, Polls open 7:00 a.m. to 8:00 p.m.” The version that ran after the primary was identical to the first version except that it contained a banner at the bottom that stated, “Looking Forward for Our future, Our Strength is our Seniority.”

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1 election (the *Pew* ad). The *Pew* ad criticized Knowles' involvement in the Pew Commission,  
2 which had issued a final report in May 2003 that made recommendations concerning the nation's  
3 oceans policy.<sup>5</sup> At the RTB stage, the Commission found, pursuant to the regulations then  
4 applicable, that the *Pew* ad constituted an electioneering communication. See RTB F&LA at  
5 pp.11-12.

6 BA board member, Jack Frost, was involved in the production of the ad, including  
7 providing the voice-over.<sup>6</sup> Frost's company, Jack Frost and Friends ("JF&F"), placed the ad on  
8 four television stations for spots originally scheduled to air from August 31-September 5, 2004.  
9 JF&F made \$11,358 in initial payments for the production and media placement costs for the *Pew*  
10 ad. BA paid Frost \$14,000 for the ad a few days later. However, Frost represented that not all of  
11 the broadcast time ordered was available resulting in refunds of \$3,800. Media buy documents  
12 indicate that spots originally scheduled to air on September 5, and some spots scheduled to air on  
13 September 3 were apparently cancelled. All told, it appears that the *Pew* ad cost approximately  
14 \$8,350.

<sup>5</sup> A transcription of the television ad included with the complaint reads:

**Narrator:** When Tony Knowles was governor, he agreed to serve on the Pew Commission, a group dominated by outside liberals who tried to give control of fisheries to bureaucrats and extreme environmental groups who targeted fisheries areas for closure. And Tony Knowles endorsed it. **Ezra Campbell (charter fishing captain):** We don't have a clue why Governor Tony Knowles would even want to be remotely involved in something so ludicrous. **Narrator:** If you want to find out more, call Tony Knowles and ask him what he was thinking when he endorsed the Pew Commission recommendations. **Accompanying Visual:** To Find Out More Call Tony Knowles and Ask About his Pew recommendations. **Narrator:** Paid for by Business Alaska. **Accompanying Visual:** Not authorized by any candidate. Paid for by Business Alaska, 645 G Street, #100-99501. Tom McGrath, Treasurer

<sup>6</sup> BA's interrogatory response identified Frost as a board member, and he is listed as one of seven incorporators and as a member of BA's board of directors in its Articles of Incorporation, which were filed on March 12, 2004. Frost's signature appears on the bottom of each page of the Articles along with the other listed members of the board.

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1                                   c.     Other BA Activities

2             A substantial portion of BA's disbursements through January 2005 financed activities  
3     unrelated to federal campaign activity. These disbursements included: payments to FA, most of  
4     which covered the salary of BA/FA's executive director; payments to Future of Alaska, another  
5     non-profit organization apparently involved in state and/or local elections; payments to Frost's  
6     company, JF&F, for a radio ad campaign responding to a newspaper editorial attacking then-state  
7     senator, Ben Stevens; and disbursements for expenses such as a computer and software, post office  
8     box and bank fees.

9             BA's president, John Floyd, has represented that BA has been inactive for several years,  
10    has minimal or no assets and intends to terminate as a corporation.

11                   B.     LEGAL ANALYSIS

12                           1.     Political Committee Status

13            The Act defines a "political committee" as any committee, club, association, or other group  
14    of persons that receives "contributions" or makes "expenditures" which aggregate in excess of  
15    \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). In determining whether an organization  
16    makes an expenditure, the Commission analyzes whether expenditures for any of an organization's  
17    communications made independently of a candidate contain phrases of express advocacy or could  
18    only be interpreted by a reasonable person as containing advocacy of the election or defeat of a  
19    clearly identified candidate when taken as a whole with limited reference to external events. *See*  
20    11 C.F.R. § 100.22.

21            The Commission previously found reason to believe that *Seniority* contained express  
22    advocacy. Thus, BA made an expenditure of \$21,692.

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1 To address constitutional overbreadth concerns, the Supreme Court has held that only  
2 organizations whose major purpose is the nomination or election of federal candidates can  
3 potentially qualify as political committees under the Act. *See e.g., Buckley v. Valeo*, 424 U.S. 1,  
4 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). Likewise, the  
5 Commission has applied the Court’s major purpose test in determining whether an organization is  
6 a “political committee” under the Act as limited to organizations whose major purpose is federal  
7 campaign activity (*i.e.*, the nomination or election of federal candidates). *See Political Committee*  
8 *Status*; Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (2007).

9 The types of conduct the Commission has examined in considering whether an  
10 organization’s major purpose is federal campaign activity include an organization’s fundraising  
11 solicitations, public statements and internal documents about an organization’s mission, and  
12 whether the organization engaged in activities that were not campaign-related. *Id.* at 5605.

13 BA’s public statements and internal documents did not include statements that would  
14 support a determination that its major purpose was federal campaign activity. *See* Section II.A.1  
15 *supra* at 3-4. BA apparently did not solicit funds from the public, did not engage in fundraising  
16 activities, made no statements about its purpose in written solicitations or oral presentations to  
17 donors, and had no website. *Id.* Finally, although BA financed the *Seniority* and *Pew* ads, the  
18 substantial portion of its disbursements were for activities unrelated to federal campaign activity.  
19 *See id.* at 6-7. Accordingly, although BA’s expenditure of \$21,692 for *Seniority* exceeded the  
20 statutory threshold for political committee status, the evidence does not establish that BA’s major  
21 purpose was federal campaign activity. Therefore, we conclude that BA was not a political  
22 committee required to register with the Commission and file disclosure reports.

2. **Other Allegations**

The Commission also previously found reason to believe that the disbursements associated with the *Pew* ad violated the corporate financing ban on electioneering communications. At that time, corporations were prohibited from financing an electioneering communication with their general treasury funds, and a broadcast communication constituted an electioneering communication (“EC”) if it was made within 60 days of a general election, aired on stations capable of being received by 50,000 or more individuals, and if it referred to a clearly identified candidate. *See* 2 U.S.C. §§ 441b(b)(2) and 434(f)(3). The *Pew* ad met those criteria.

Since then, however, the U.S. Supreme Court has limited the reach of the prohibition on corporate funding of ECs to communications that are “the functional equivalent of express advocacy”, which the Court concluded were communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *WRTL*, 127 S. Ct. at 2667. Under the Commission regulations that implemented *WRTL*, a communication is reviewed first under a regulatory safe harbor. 11 C.F.R. 114.15(b). If an ad does not qualify for the safe harbor, the Commission considers whether the communication is the functional equivalent of express advocacy. 11 C.F.R. 114.15(c). Even if the *Pew* ad does not fall within the regulatory safe harbor provided at 114.15(b), it is, on balance, susceptible of a reasonable interpretation other than an appeal to vote for or against a clearly identified federal candidate. Consequently, BA was not prohibited from financing the ad with corporate treasury funds. Regardless of whether the Commission’s disclaimer and reporting regulations apply to communications that are not the functional equivalent of express advocacy, the costs associated with the *Pew* ad for the single day the ad aired within the EC time frame were at most \$5,300, well under the \$10,000 reporting threshold for electioneering communications. 2 U.S.C. §§ 434(f)(1) and (2). The disclaimer on

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1 the *Pew* ad, on the other hand, would not meet the requirements of 2 U.S.C. § 441d.<sup>7</sup> Thus, the  
2 Commission concludes that BA did not trigger political committee status and, given the Supreme  
3 Court's decision in *WRTL*, BA was not prohibited from making disbursements related to the *Pew*  
4 ad. Nevertheless, as discussed above, BA made a corporate expenditure of \$21,692 for *Seniority*,  
5 which is prohibited under 2 U.S.C. § 441b(a), and it did not file an independent expenditure report  
6 disclosing this expenditure as required by 2 U.S.C. § 434(c). In addition, the disclaimer on the  
7 *Seniority* ad did not meet all of the requirements of 2 U.S.C. § 441d.<sup>8</sup>

8         Given that BA is essentially defunct with minimal or no assets, has been inactive for  
9 several years, and has little potential for future fundraising based on its representation that it  
10 intends to terminate as a corporation, Commission resources and priorities would be better served  
11 by exercising the Commission's prosecutorial discretion with regard to the remaining potential  
12 violations. The Commission, therefore, has decided to take no further action in this matter and  
13 close the file. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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<sup>7</sup> The disclaimer did not state that it was not authorized by a candidate committee and contained no audio statement stating that BA was responsible for the ad content. *See* 2 U.S.C. §§ 441d(a)(3) and (c)(2).

<sup>8</sup> The disclaimer on *Seniority* stated that it was paid for by BA, included BA's name and address, and stated that it was not paid for by any candidate. However, it was not "clearly readable" by a reader, as the typeface used was in extremely small font, it failed to state that the ad was not paid for by any candidate's authorized committee, and it was not boxed and set apart from the rest of the ad content. *See* 2 U.S.C. §§ 441d(c)(1), 441d(a)(3) and 441d(c)(2).